Dr Munawar Ahmad Aness v Ketua Pengarah Penjara, Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 44-105 OF 1998
ABDUL WAHAB J
15 JANUARY 1999

Criminal Procedure *— Disclosure of information — Production of documents — Application filed independently and separately from criminal appeal, effect of — Whether application should be made to court hearing the criminal appeal*

Criminal Procedure *— Disclosure of information — Production of documents — Application for detailed records maintained under Prisons Act 1995, Prison Rules 1953 & Prisons Rules 1953 — Whether applicant conferred right to inspect records — Whether such records are required to be maintained*

Evidence *— Documentary evidence — Public document — Detailed schedules of applicant's visitors and movements sought — Whether applicant conferred a right to inspect such documents*

The applicant filed an application against both the Director General of Prisons, Malaysia ('DGP') and the Inspector General of Police ('IGP') seeking to obtain certain documents to be used for the preparation of a pending appeal. Against the DGP, the applicant sought to obtain a detailed schedule of visitors, police or otherwise, from the time the applicant was transferred from Kajang Prison on 19 September 1998. Against the IGP, the applicant sought to obtain a detailed schedule of all movements from the date of his arrest, viz 14 September 1998 until he was produced in the sessions court on 19 September 1998. At the outset of the hearing of the application, the deputy public prosecutor ('the DPP') raised a preliminary objection arguing that the application was unclear as to under what provision it was made. According to the DPP, if the application was made under s 51 of the Criminal Procedure Code (FMS Cap 6) ('CPC'), it could only be made in the court that was conducting the proceeding and if it was made under s 317 of the CPC, the evidence must be in relation to the offence or charge but not to other matters. The DPP further contended that if the application was made by invoking s 5 of the CPC, the power was only confined to what went on before the court and even then the court could only consider the application if it was shown by way of affidavit that the plea was equivocal. Counsel for the applicant however submitted, inter alia, that the application was made under the provisions of the Prisons Act 1995, Prisons Rules 1953, Evidence Act 1950, Lockup Rules 1953 and the inherent jurisdiction of the court. Counsel further argued that the applicant was applying for documents kept and maintained by the prisons officers in the discharge of their duties and that the applicant had a clear interest in the documents as they were concerned with his freedom and liberty. Having heard submissions of the parties, the

court dismissed the preliminary objection but took into account the arguments when it dealt with the application proper. A

The issues for the court's consideration was therefore, whether: (i) an application for records maintained under the Prisons Rules and the Lockup Rules ('the Rules') could be made as an independent question; (ii) the application was for records maintained under the relevant provisions of the Rules; (iii) the Rules gave any right to inspection of its records; and (iv) the application could be made under the Evidence Act 1950. B

Held, dismissing the application:

(1) The application — an interlocutory application — being filed separately from the appeal would result in the likelihood of a different court hearing the application from that hearing the appeal itself. It thus resulted in one court deciding upon matters relating to a matter before another court of concurrent jurisdiction and such a circumstance was undesirable. The application should therefore have been made in the criminal appeal to ensure that the court hearing the appeal dealt with it as with all matters relating to the appeal (see p 298C–H). C D

(2) There was no evidence to suggest that such a detailed schedule as requested in the application was actually maintained by the Prisons. Indeed there was nothing in the Prison Rules that required a detailed schedule of visitors be maintained. Furthermore, there was no evidence that the applicant was moved from the Kajang Prison on 19 September 1998 as asserted in the application (see p 299C–D). With regard to the prayer against the IGP, the Lockup Rules do not specify or suggest that the information sought in the application wwas to be recorded as matters of importance and was to be available. The rules do not provide that the journal that is maintained is to be made available to any party. Overall, the application had the effect of requiring the DGP and IGP to create a schedule from records or data that may or may not exist. No authority was submitted to the court for such an undertaking and the existing authorities only relate to the production of extracts of records or journals and not a detailed schedule (see p 300C–I). E F G

(3) As to whether an application could be made under the Evidence Act 1950, reliance was entirely upon ss 74 and 76 of the Act. For s 76 to apply the document must be shown to be a public document, the applicant must have a right to inspect it and the applicant must tender the legal fees therefor. By virtue of s 74 a public document is a document which must itself form the act or record of the acts of a public officer. A record of matters that a public officer is required by law to maintain is a public document, even though it may be a record of acts of visitation by other persons (see p 302A–303A) . With regard to the applicant's right to inspect the documents, there is nothing in the Prisons Act 1995, the Prison Rules 1953 and the Lockup Rules 1953 H I

that conferred a right upon the applicant to inspect the records (see p 303B). Furthermore there was no undertaking or offer to pay any fees by the applicant. Lastly, the applicant had not included the general cure-all prayer that would have allowed the court to consider other orders. Therefore the application should be rejected (see p 304E–H).

[Bahasa Malaysia summary

Pemohon telah memfailkan permohonan ini terhadap Ketua Pengarah Penjara, Malaysia ('KPP') dan Ketua Polis Negara ('KPN') untuk mendapat beberapa dokumen tertentu untuk membuat persiapan dalam suatu rayuan. Terhadap KPP, pemohon ingin mendapatkan senarai terperinci pelawat, polis atau selainnya, dari masa pemohon telah dipindahkan dari Penjara Kajang pada 19 September 1998. Terhadap KPN, pemohon ingin mendapatkan senarai terperinci segala pergerakan dari tarikh penangkapannya, iaitu dari 14 September 1998 sehingga dia telah dihadapkan ke mahkamah sesyen pada 19 September 1998. Pada permulaan pembicaraan permohonan tersebut, timbalan pendakwa raya ('TPR') telah mengemukakan bantahan permulaan, berhujah bahawa permohonan tersebut tidak jelas berkenaan di bawah peruntukan manakah ia dibuat. Menurut TPR, jika permohonan tersebut dibuat di bawah s 51 Kanun Acara Jenayah (NMB Bab 6) ('KAJ'), ia hanya boleh dibuat di mahkamah yang telah mengendalikan prosiding tersebut dan jika ia dibuat di bawah s 317 KAJ, keterangan mestilah berkaitan kesalahan atau tuduhan tetapi bukan terhadap perkara yang lain. TPR seterusnya berhujah bahawa jika permohonan tersebut dibuat dengan menggunakan s 5 KAJ, kuasa hanyalah terbatas kepada apa yang berlaku di hadapan mahkamah dan meskipun demikian mahkamah cuma boleh mempertimbangkan permohonan tersebut jika ia ditunjukkan melalui afidavit bahawa akuan adalah taksa (equivocal). Peguam pemohon bagaimanapun berhujah, antara lain, bahawa permohonan tersebut telah dibuat di bawah Akta Penjara 1995, Kaedah Penjara 1953, Akta Keterangan 1950, Kaedah Lokap1953 dan bidang kuasa sedia ada mahkamah. Peguam seterusnya berhujah bahawa pemohon telah memohon untuk dokumen yang disimpan dan diselenggarakan oleh pegawai penjara dalam melaksanakan tugas-tugas mereka dan bahawapemohon mempunyai kepentingan yang jelas dalam dokumen-dokumen tersebut oleh kerana ia berkaitan dengan hak kebebasannya. Setelah mendengar hujahan kedua pihak, mahkamah menolak bantahan permulaan tetapi telah mengambilkira hujahan tersebut apabila ia mempertimbangkan permohonan tersebut.

Isu-isu untuk pertimbangan mahkamah adalah sama ada: (i) permohonan untuk rekod-rekod yang diselenggarakan di bawah Kaedah Penjara dan Kaedah Lokap ('Kaedah-kaedah tersebut') boleh dibuat sebagai persoalan berasingan; (ii) permohonan tersebut adalah

untuk rekod-rekod yang diselenggarakan di bawah peruntukan relevan Kaedah-kaedah tersebut; (iii) Kaedah-kaedah tersebut memberi apa-apa untuk hak menyemak rekod-rekodnya; dan (iv) permohonan tersebut boleh dibuat di bawah Akta Keterangan 1950. A

Diputuskan, menolak permohonan: B

(1) Permohonan tersebut — suatu permohonan interlokutori — yang difailkan berasingan dari rayuan, berkemungkinan besar akan mengakibatkan sebuah mahkamah lain membicarakan permohonan tersebut daripada mahkamah yang membicarakan rayuan tersebut. Dengan itu, ia telah mengakibatkan satu C mahkamah memutuskan perkara-perkara yang berkaitan suatu perkara yang berada di hadapan sebuah mahkamah lain yang mempunyai bidang kuasa bersama dan keadaan sebegitu adalah tidak diingini. Permohonan tersebut seharusnya dengan itu dibuat di rayuan jenayah tersebut untuk memastikan mahkamah yang membicarakan rayuan itu menghadapinya seperti D mana semua perkara yang berkaitan dengan rayuan tersebut (lihat ms 298C–H).

(2) Tiada keterangan untuk mengatakan bahawa senarai terperinci yang dipohon dalam permohonan tersebut sebenarnya telah diselenggarakan oleh Jabatan Penjara. Sesungguhnya tidak ada E apa-apa dalam Kaedah Penjara yang menghendaki senarai terperinci pelawat untuk diselenggarakan. Selanjutnya, tiada keterangan bahawa pemohon telah dipindahkan dari Penjara Kajang pada 19 September 1998 seperti mana yang dinyatakan di dalam permohonannya (lihat ms 299C–D). Berkaitan dengan F permohonan terhadap KPN, Kaedah Lokap tidak menetapkan atau menyarankan bahawa maklumat yang diperlukan dalam permohonan tersebut patut direkodkan sebagai perkara yang penting dan patut disediakan ada. Kaedah-kaedah tersebut tidak memperuntukkan bahawa jurnal yang diselenggarakan mesti disediakan untuk semakan mana-mana pihak. Pada G keseluruhannya, permohonan tersebut mempunyai akibat menghendaki KPP dan KPN mewujudkan senarai dari rekod-rekod atau data yang mungkin ataupun mungkin tidak wujud. Tidak ada autoriti telah diserahkan ke mahkamah untuk mengasaskan tugas sebegini dan autoriti-autiriti yang sedia ada cuma berkaitan dengan pemberian petikan rekod atau jurnal dan H bukan senarai terperinci (lihat ms 300C–I).

(3) Mengenai sama ada permohonan tersebut boleh dibuat di bawah Akta Keterangan 1950, pergantungan sepenuhnya adalah pada ss 74 dan 76 Akta tersebut. Sebelum s 76 boleh terpakai dokumen tersebut mestilah ditunjukkan sebagai dokumen awam, pemohon I mestilah mempunyai hak memeriksanya dan pemohon mestilah membuat bayaran di sisi undang-undang untuknya. Berdasarkan s 74 dokumen awam adalah sebuah dokumen yang dengan sendirinya mesti merupakan perbuatan atau rekod gerakan

seorang pegawai awam. Sesebuah rekod tentang perkara-perkara yang dikehendaki oleh undang-undang diselenggarakan oleh seorang pegawai awam adalah sebuah dokumen awam, walaupun ia mungkin adalah rekod lawatan oleh orang lain (lihat ms 302A–303A). Mengenai hak pemohon untuk memeriksa dokumen-dokumen tersebut, tiada apa-apa di Akta Penjara 1995, Kaedah Penjara 1953 dan Kaedah Lokap 1953 yang memberi hak kepada pemohon untuk memeriksa rekod tersebut (lihat ms 303B). Tambahan lagi, tiada akujanji atau tawaran untuk membayar apa-apa bayaran oleh pemohon. Akhirnya, pemohon tidak memasukkan permohonan perintah am (general cure-all prayer) yang akan membolehkan perintah lain dipertimbangkan mahkamah. Maka, permohonan patut ditolak (see p 304E–H).]

Notes

For cases on disclosure of information, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1165–1181.

For cases on public documents generally, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 754–760.

Cases referred to

Anthony Gomez v Ketua Polis Daerah Kuantan [1977] 2 MLJ 24 (refd)
Chua Qwee Teck v PP [1991] 3 MLJ 411 (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Heyne v Fischel & Co (1913) 30 TR 190 (refd)
PP v Raymond Chia Kim Chwee & Anor [1985] 2 MLJ 436 (refd)
R v Coventry Crown Court 67 Cr App R 315 (refd)
R v Crown Court at Huntingdon & Ors, ex p Jordan [1981] 2 All ER 872 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 5, 51, 317
Courts of Judicature Act 1964 s 61(4)
Evidence Act 1950 ss 35, 74, 76, 77
Lockup Rules 1953 r 34
Prisons Act 1995
Prisons Rules 1953 rr 34(1), (2), 212, 213, 214

Manjeet Singh Dhillon (*Balwant Singh Sidhu* with him) (*Balwant Singh Sidhu & Co*) for the applicant.

Mohd Yusof Zainal (*K Muniandy* and *Zauyah Bee* with him) (*Attorney General's Chambers*) for the respondants.

Abdul Wahab J:

The background

According to his affidavit dated 22 October 1998 in support of this application, the applicant, Dr Munawar Ahmad Aness was arrested on the morning of 14 September 1998. He complained of chest pains on 14 September 1998 and was taken to the General Hospital Kuala Lumpur on the 15 September 1998. He was brought before the Kuala Lumpur Sessions Court on 19 September 1998. He was sent the same day to Kajang Prison. Because of failing health, he was sent to the National Heart Institute and later transferred to the coronary rehabilitation ward at Ward 29 at the Kuala Lumpur General Hospital. There was an incidental mention of a conviction and sentence recorded on 19 September 1998.

On 6 October 1998, the solicitors for the applicant, Messrs Balwant Singh Sidhu & Co, wrote to the Pengarah, Penjara Kajang. The relevant portion is as follows:

> Untuk tujuan-tujuan rayuan Dr Munawar di Mahkamah Tinggi Kuala Lumpur, kami perlu mendapatkan pengesahan (confirmation) tentang:
>
> (1) tanda pengenalan (identiti);
>
> (2) tarikh dan waktu; dan
>
> (3) tujuan
>
> semua pelawat-pelawat Dr Munawar (termasuk pihak polis dan orang awam dan peguam-peguam, bermula dari 20 September 1998 hingga ke hari ini. Keterangan-keterangan ini boleh di didapati dari sebuah buku laporan (logbook) yang diselenggarakan oleh pegawai-pegawai Tuan di Wad 29 Hospital Besar Kuala Lumpur.

On 14 October 1998 the said solicitors wrote to the Inspector General of Police. The relevant part of the letter is as follows:

> Bagi tujuan-tujuan rayuan Dr Munawar ke Mahkamah Tinggi Kuala Lumpur kami perlu mengesahkan semua pergerakan Dr Munawar di antara 14 September 1998 hingga 19 September 1998. Kami ingin menarik perhatian tuan kepada k 34(2) Lockup Rules 1998 dan journal yang perlu di simpan di bawah Kaedah tersebut.
>
> Sila mengesahkan secara tulisan semua gerakan Dr Munawar di dalam dan di luar lokap dan secara khas:
>
> (1) identiti orang/semua orang yang membawa beliau ke luar dari lokap;
>
> (2) tarikh dan waktu pindahan (removal) tersebut;
>
> (3) maksud pindahan (removal) tersebut;
>
> (4) tarikh dan waktu kepulangan (return); dan
>
> (5) lokasi lokap.

There being no response, the applicant filed this application in the afternoon of 23 October 1998 for orders as follows:

> 1 Bahawa Inspektor-General Polis, Malaysia memberikan suatu jadual terperinci berkenaan segala pergerakan Dr Munawar Ahmad Aness dari waktu penahanan beliau pada 14 September 1998 hingga pada waktu beliau dibawa ke Mahkamah Sesyen Kuala Lumpur pada 19 September 1998 di mana beliau telah dituduh dalam Kes Tangkap No 62-134 of 1998 dan bahawa keterangan lanjut yang diberikan termasuklah:

(i) Tarikh dan waktu pergerakan atau pemindahan;

(ii) Identiti pegawai-pegawai yang membawa beliau atau yang memindahkan beliau;

(iii) Tujuan membawa beliau atau tujuan memindahkan beliau;

(iv) Tempat beliau dibawa.

2 Bahawa Ketua Pengarah Penjara, Malaysia memberikan suatu jadual terperinci mengenai semua pelawat-pelawat, polis dan bukan polis, yang diterima oleh Dr Munawar Ahmad Aness dari waktu beliau dipindahkan dari penjara Kajang pada 19 September 1998 hingga ke tarikh perintah tersebut.

It is this application we are concerned with today.

The preliminary objection

At the outset Encik Mohd Yusof Zainal, the senior DPP had argued that the application is unclear as to under what provision it is made. In theory, such an application could be made under ss 51, 317 of the Criminal Procedure Code (FMS Cap 6) ('CPC'), or through s 5 CPC, the relevant English law.

It was submitted that an application under s 51 must be made in the court that is conducting the proceeding (*PP v Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 436 (SC)), which in the circumstances of this case means the High Court hearing the appeal. The application cannot stand on its own. Further, the section refers to 'property or document', in other words, something that must pre-exist, and not something that has to be prepared.

It was submitted that if it were made under s 317 CPC, the evidence must be in relation to the offence or charge, but not to other matters. It was submitted that the current circumstances is closer to the circumstances envisaged in s 61(4) of the Courts of Judicature Act 1964 which however is applicable to the Court of Appeal only.

The senior DPP further submitted that the application could be relying on s 5 CPC, that English law may be adopted to the extent it does not conflict or be inconsistent with the CPC and can be made auxiliary thereto. In such case, it was submitted that in *R v Coventry Crown Court* 67 Cr App R 315 DC, it was held that the power is confined to what went on before the court.

As to the procedure, *Archbold on Criminal Pleadings, Evidence and Practice 1997* stated that the Court may only consider the application if an affidavit is filed to show that the plea was equivocal. The application thus should be by way of a notice of motion with a supporting affidavit. *R v Crown Court at Huntingdon & Ors, ex p Jordan* [1981] 2 All ER 872 and *Chua Qwee Teck v PP* [1991] 3 MLJ 411, were cited as illustrations.

Mr Manjeet Singh had maintained in his reply there was no suggestion in his application of reliance upon any of the provisions argued by the senior DPP. The title to the application, he argues, shows clearly it is an application under the Prisons Act, the Prisons Rules, the Lockup Rules, and

the inherent jurisdiction of the court. He argued that the applicant is asking for documents kept and maintained by the prisons officers in the discharge of their duties, that where such documents are such as where the applicant has a clear interest because they are concerned with his freedom and liberty, he has a right.

Mr Manjeet Singh said that an application under s 317 would be forthcoming after the applicant has collected the necessary information and documents to support the application. For that reason it was premature to raise s 317 in objection. Mr Manjeet argued that there is abundant authority in Malaysia as to setting aside a plea of guilty when it is equivocal, but that is not the question before the court in this application. He emphasized that the application before the court is distinct from an application under s 317 which would be made in due course, and equally, and appeal as to whether the plea is equivocal or otherwise would be an issue before the court but not on this day.

The application is intituled as follows:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN JENAYAH)
PERMOHONAN JENAYAH PELBAGAI NO 44-105 TAHUN 1998

Dalam perkara Rayuan Jenayah
Mahkamah Tinggi Kuala Lumpur
(Bahagian Jenayah) No 42-44-1998
Dr Munawar Ahmad Aness lwn PR

Dan

Dalam perkara perbicaraan Jenayah Mahkamah Sesyen Kuala Lumpur No 62-134-1998 PR lwn Dr Munawar Ahmad Aness

Dan

Dalam perkara Akta Penjara 1995

Dan

Dalam perkara Lockup Rules 1953 dan Prison Rules 1953

Dan

Dalam perkara bidangkuasa sedia ada Mahkamah Tinggi Malaya

Antara

Dr Munawar Ahmad Aness ... Pemohon

Dan

1 Ketua Pengarah Penjara, Malaysia
2 Inspektor-Jeneral Polis, Malaysia
3 Kerajaan Malaysia ... Responden-responden

Other than the mention in the title above, there is no reference to the Prisons Act, the Prisons Rules, or the Lockup Rules in the application. The

A statement of the Act or the aforesaid Rules relied upon in the title is of a general nature. It must be noted that the Prisons Rules and the Lockup Rules only provide the provisions for prison conditions and procedures and for the purpose of which certain journals are maintained. Other than the reference to 'perkara bidangkuasa sedia ada Mahkamah Tinggi Malaya', there is no suggestion in the application as to whether the applicant is
B relying on the sections mentioned in the CPC or as Mr Manjeet Singh asserts now in submissions, in the Evidence Act 1950, as the basis the application is made.

The preliminary objection and the answer to the objection shows a lack of specificity as to the provisions it relies upon.

C While the substance of the application may well lie within the Prisons Rules and the Lockup Rules, the application does not show whether it is an application under the provisions of the CPC or the Evidence Act 1950. Such a failure can hinder a party's ability to prepare adequately an answer and even submissions. A fair hearing can only take place if the parties are fairly apprised of the issues they have to answer and submit upon, and it
D ultimately reflects upon the quality of justice that can be achieved. It is only fair that the applicant makes clear what he relies on. For that reason where the lack of clarity embarrasses a party, the court may either dismiss the application or order an adjournment as it thinks just in the circumstances of the case.

E I had ordered that I would hear the application proper and rule upon the preliminary objection at the end of the submissions. I do so now. Since (a) there is no indication in this case that the respondents are so embarrassed as to be unable to reply to or submit upon the application or that it would be unfair to allow the application to be proceeded with, (b) these objections nevertheless have a bearing on the consideration of the
F issues in this application, and (c) can suitably be considered in the context of the application as a whole, I would dismiss the preliminary objection but take account of the arguments in dealing with the application as if the arguments were taken in the application itself.

I proceed now to deal with the application itself.

G

The application

The submissions were extensive in scope. I do not propose to deal with all of the matters raised in the submissions. It is only necessary in this decision to deal with the issues directly concerning this application for the reasons
H that will become apparent.

Taking the issues raised in preliminary objection into consideration, I would reformulate the questions in this application before the court as follows:

(1) Whether an application for records maintained under the Prisons Rules
I and the Lockup Rules can be made as an independent application.

(2) Whether this application is for records maintained under the relevant provisions of the Prisons Rules and the Lockup Rules.

(3) Whether the Prisons Rules and the Lockup Rules give any right to inspection of its records.

(4) Whether the application can be made under the Evidence Act 1950.

The first question

Assuming the application is properly made, be it under the Prisons Act, the respective Rules or under the Evidence Act, the first question is whether the application may be made as an independent application. This application has been made as a general criminal application. The application itself does not state what the documents sought are for. Paragraphs 17 and 20 of the supporting affidavit and a reference in the intitulement indicates that the information is to be used for the preparation of a pending appeal.

If so, then the application is analogous to an interlocutory application. Being filed separately from the appeal, it would result in the likelihood of a different court hearing the application from that hearing the appeal itself. It results in one court deciding upon matters relating to a matter before another court of concurrent jurisdiction. Such a circumstance is undesirable. We must be concerned that the independence of that court in making its decision must maintained. The court hearing Appeal No 42-44-98 must be allowed to deal with all of the matters or applications relating to that appeal.

What then if a request for a certified copy to which an applicant is entitled is refused even upon the undertaking to pay the legal fee therefor? In such a case, there may well have been a denial of a right, for which in the normal course a civil action may lie.

Section 76 Evidence Act itself is of a general nature and is not confined to criminal cases. It does not require that an action or suit be in existence before an applicant may seek a copy. Ordinarily, a refusal to give a certified copy or allow inspection should be a matter of an appropriate application in the civil jurisdiction. A court in the criminal division confines itself to the criminal jurisdiction. Only if such application relates directly to a criminal matter may the application be made in that criminal matter and for the reason above, in the court hearing that criminal matter.

For these reasons I conclude that the application must be made in the criminal appeal file to ensure that the court hearing the appeal deals with it as with all matters relating thereto.

The second question

The factual basis in respect of the first and the second respondents differ slightly.

(a) The first respondent:

The application against the first respondent is for:

> Bahawa Ketua Pengarah Penjara, Malaysia memberikan suatu jadual terperinci mengenai semua pelawat-pelawat, polis dan bukan polis, yang diterima oleh Dr Munawar Ahmad Aness dari waktu beliau dipindahkan dari penjara Kajang pada 19 September 1998 hingga ke tarikh perintah tersebut.

A The application is for a detailed schedule of visitors, police or otherwise, from the time the applicant was transferred from Kajang Prison on 19 September 1998. Are records of this nature maintained by the prisons. Now rr 212 and 213 of the Prisons Rules 1953 provide:

> 212 The Officer-in-Charge shall keep a journal wherein he shall record all matters of importance relating to the prison or prisoners, and such matters of which he is directed to keep a record by these rules.
>
> 213 Every Officer-in-Charge shall be responsible for seeing that proper records are kept of all such circumstances, and of any correspondence connected with such circumstances, as affect the interests of particular prisoners, and shall bring the cases to the notice of the Commissioner after such time, or at such intervals, as may be proper in each case.

B C There is no evidence to suggest that such a detailed schedule as requested in the application is actually maintained under r 213 by the prisons as a circumstance that affects the interests of the prisoner. Rule 212 requires that a journal of the Officer-in-Charge's actions for example under r 214 be D kept but here again there is nothing in the rules that require a detailed schedule of visitors be maintained.

Secondly and more importantly, the application is for a detailed schedule of visitors, police and civilian 'yang diterima oleh Dr Munawar Ahmad Aness dari waktu beliau dipindahkan dari penjara Kajang pada 19 September 1998 ke tarikh perintah tersebut.'. There is no evidence E whatsoever the applicant was moved from the Kajang Prison on 19 September 1998 as asserted in the application. In fact para 18 of his affidavit asserts he was sent to National Heart Institute from Kajang Prison on September 23, 1998 and from there he was transferred to Kuala Lumpur General Hospital. Paragraph 198 of the statutory declaration affirmed on F 7 November 1998 is to the same effect. Further the term 'perintah tersebut' is unclear as to which order it is referring to. There is nothing in the affidavit that clarifies it. The prayer as such is not supported by the evidence advanced by the applicant.

(b) The second respondent

G The application against the second respondent is:

> Bahawa Inspektor-General Polis, Malaysia memberikan suatu jadual terperinci berkenaan segala pergerakan Dr Munawar Ahmad Aness dari waktu penahanan beliau pada 14 September 1998 hingga pada waktu beliau dibawa ke Mahkamah Sesyen Kuala Lumpur pada 19 September 1998 di mana beliau telah dituduh dalam Kes Tangkap No 62-134 of 1998 dan bahawa keterangan lanjut yang diberikan termasuklah:
>
> (i) Tarikh dan waktu pergerakan atau pemindahan;
>
> (ii) Identiti pegawai-pegawai yang membawa beliau atau yang memindahkan beliau;
>
> (iii) Tujuan membawa beliau atau tujuan memindahkan beliau;
>
> (iv) Tempat beliau dibawa.

H I This part of the application, as worded, is for a detailed schedule of all

movements of the applicant from 14 September 1998 until production in the Sessions Court on 19 September 1998, including the details in paras (i) to (iv).

Rule 34 of the Lockup Rules provide:

> (1) The Officer-in-Charge shall be responsible that all written laws and rules relating to lockups, prisoners and staff are strictly followed and that discipline and cleanliness are maintained.
>
> (2) The Officer-in-Charge shall maintain or cause to be maintained a Journal (in these Rules referred to as 'the Journal') in which shall be recorded all matters and occurrences of importance, including the number of prisoners in custody after each meal, and these entries shall be dated and signed daily.

The Rules does not specify or suggest that the information sought in the application is recorded as matters and occurrences of importance and is available.

It is clear however from the wording in the application that the applicant is seeking for the relevant respondent to prepare a schedule of information in respect of the applicant and in a format the applicant desires. The respective respondents are in effect asked to create a schedule from records or data that may or may not exist, and in ordinary parlance, to make a report. There is no authority submitted before this court for such an undertaking. The Federal Court case of *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 (FC) was cited by counsel. That case however concerns admissibility of the lockup register. Abdoolcader FJ, delivering the judgment of the Federal Court said (at p 272B–H):

> There is unfortunately no evidence before us as to the Inspector-General's Standing Orders made under s 97 of the Police Act 1967 with regard to the nature and purpose of a station diary and the ambit and extent of the official duty of the person making the entries therein to determine whether s 35 of the Evidence Act 1950 indeed applies thereto. The Privy Council held in *Dirgaj Deo Bahadur v Beni Mahro & Ors* AIR 1917 PC 197 that if, in the case of official documents admissible in evidence under s 35 of the Indian Evidence Act 1872 (which is in pari materia with ours), it could be shown that any particular part was in excess of the official duty by reason of which it came into existence, that part might not be admissible. The lock-up register however is clearly admissible under s 35 of the Evidence Act as it is a journal within r 34(2) of the Lockup Rules 1953, and the lock-up register produced has cross-references to entries in the station diaries; this correlation would therefore make all the relevant entries in the station diaries admissible as they would form part of the lock-up register and the two must therefore be read conjointly. When it is the duty of a public officer to make some entries in any public or other official book it is admissible in evidence to prove the truth of the facts entered as well as the fact that the entries were made by him although their authenticity be not confirmed by the usual test of truth, namely, the swearing and cross-examination of the person who prepared them. In any event, all the entries were put to Inspector Aziz who confirmed them and they accordingly form part of the evidence before the learned Judge in the voir dire.

This application however is concerned with the production of a detailed schedule by the respondents. The court is not concerned with their admissibility, which is a matter under s 35 of the Evidence Act 1950. The

authorities that exist are to produce relevant extracts of records or journals, not a detailed schedule as applied for.

For these reasons alone the application against both respondents may be rejected.

The third question

The Prisons Rules makes no provision itself that any of the records kept under the Rules may be produced to any person other than for the use of the prisons authorities.

Similarly, in respect of the second respondent. While r 34(1) requires the Officer-in-Charge to ensure all written laws and rules relating to lockups, prisoners and staff are strictly followed, and r 34(2) provides that a journal is to be maintained to record all matters and occurrences of importance, the Rules or the Act does not specify what the matters and occurrences of importance. The Rules, while providing rules for accommodation; admission and discharge; treatment of prisoners; visits, letters and privileges; offences and punishment; staff and conduct of subordinate police officers and constables, does not itself, anywhere, provide that the journal that is maintained is to be made available to any party.

That being the case, authority for the production of the information as desired by this application must be sought elsewhere. The senior DPP thought the application was being made under the CPC, while Mr Manjeet Singh says the application is under the provisions of the Evidence Act. To my mind the very fact of the argument in this case proves the defect of the application in not giving sufficient notice as to its basis. Be that as it may, it is necessary to look beyond the Prisons Act, the Prisons Rules and the Lockup Rules for authority for production.

Nevertheless this brings us to the fourth question.

The fourth question

As to what a public officer may be ordered to issue a certified copy of under the Evidence Act is provided in s 76 of the Evidence Act 1950.

The section provides:

> Certified copies of public documents
>
> Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate, written at the foot of the copy, that it is a true copy of the document or part thereof, as the case may be, and the certificate shall be dated and subscribed by the officer with his name and his official title, and shall be sealed whenever the officer is authorized by law to make use of a seal, and the copies so certified shall be called certified copies.
>
> *Explanation* — Any officer who by the ordinary course of official duty is authorized to deliver the copies shall be deemed to have the custody of the documents within the meaning of this section.

From the words of s 76 it clear that it applies only to a public documents which the applicant has a right to inspect, and upon payment of the legal fees therefor. Thus firstly it must be shown to be a public document, and secondly that the applicant has a right to inspect it, and thirdly he tenders the legal fees therefor.

Firstly, as to public documents. A public document is defined in s 74 of the Evidence Act as:

> Public Documents
>
> The following documents are public documents:
>
> (a) documents forming the acts or records of the acts of —
>
> (i) the sovereign authority;
>
> (ii) official bodies and tribunals; and
>
> (iii) public officers, legislative, judicial and executive, whether Federal or State or of any other part of the Commonwealth or of a foreign country; and
>
> (b) public records kept in Malaysia of private documents.

It is clear from s 74 that the document must itself form the act or record of the acts of the public officer. *Sarkar on Evidence* (14th Ed) p 1078 has this to say with regard to 'acts or records of the acts':

> Clause (1): 'Acts or Records of the acts'. In construing s 74 [Indian Evidence Act 1872] it may fairly be supposed that the word 'acts' in the phrase, 'documents forming the acts or records of acts' is used in one and the same sense. The act of which the record made is a public document must be similar in kind to the act which takes shape in a public document. The kind of acts which this s has in view is indicated by s 78. The acts there mentioned, are all final completed acts as distinguished from acts of a preparatory or tentative character. The enquiries which a public officer may make whether under the [Indian] Criminal Procedure Code or otherwise, may not result in action. There may not be publicity about them. There is a substantial difference between such measures and the specific act in which they result. It is the latter only that this s was intended to apply. Unless the above distinction is drawn, we cannot see where the right of discovery is to stop [per Shepherd J, in *R v Arumugam* 20 Mad 189 at p 196; followed in *Chandi Charn v Baistab* 31 Cal 284; 8 CWN 125]. A memo sent to a magistrate by a Civil Surgeon in compliance with the former's request to report the age of an accused, is not the act or a record of his act as a public officer and it merely embodies the civil surgeon's opinion as an expert [*Abdul Halim v Saadat Ah* AIR 1928 Orrisa 155]. It would be an unwarranted restriction on the words 'documents forming the acts or the records of the acts', to say that they should be confined to those parts of an income-tax record which the Income Tax Officer has himself prepared and to exclude documents which he has himself called for (eg return, profit and loss statement etc) or which have been admitted to the record for the purpose of the assessment [*Ramarao v Venkataramayya* AIR 1940 Mad 768 (FB)].

In *Heyne v Fischel & Co* (1913) 30 TR 190, it was held that documents kept in the post office showing the times telegrams were received and sent were held not to be a public record. However, applying a liberal interpretation, I

would hold that a record of matters that a public officer is required by law to maintain is a public document, even though it may be a record of acts of visitation by other persons. The act of recording by the officer is in each case a separate and complete act.

Secondly, the section only applies if it is shown that the application is in respect of a public document which he has a right to inspect. In this regard there is nothing in the Prisons Act and Rules, and the Lockup Rules that confers a right upon the applicant to inspect those records. Reliance is entirely upon ss 74 and 76 of the Evidence Act.

Sarkar on Evidence (14th Ed) pp 1075–1076 has this to say on the right to inspect:

> In India, there is no separate enactment, except the provisions of s 76 with regard to the means of obtaining an inspection or copy of public documents. Section 76 provides for the granting of certified copies of public documents which a person has the right to inspect. But it has nowhere been laid down, how the right of inspection of public documents is to be regulated. In *Mutter v The EM Rly Co* (1888) LR 38 Ch D 92 at p 106 Lindley LJ, said:
>
> > 'When the right to inspect and to take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy, and on what is reasonably necessary for the protection of such interest. The common law right to inspect and take copies of public documents is limited by this principle and is shown by the judgment in *Rex v Justices of Staffordshire* [6 Ad & E 84 at pp 99–101].'
>
> This common law right of inspection of public document by a person interested in the document so far as may be necessary for protection of such interest has been recognised in several cases here. A person wishing to avail of the right has to show prima facie the interest which needs protection. Persons in custody of public documents are a sort of trustees for such persons. 'A right to inspect public documents is however, assumed in s 76. I think it might be inferred that the legislature intended to recognize the right generally (ie the right to inspect) for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such document should be given' [per Shepherd J, in *R v Arumugam* 20 Mad 189 (FB). Henderson J, agreed with this in *Chandi Charan v Baistab* 8 CWN 125 at p 132: 31 Cal 284: see also *Parasuram v Cocke* AIR 1942 Bom 26; 1942 Bom 71]. Right to obtain copies depends upon applicant's right to inspect such documents [*VJ Thomas v S* AIR 1970 Ker 273]. In *R v Arumugam*, the right of an accused to apply for copies of public documents if they fall under s 74 and concern the offence with which he is charged was recognised [*S v Krishnan* AIR 1961 Mad 92 at p 96]. Under art 227 of the [Indian] Constitution the High Court may make rules for the inspection of records. This presupposes that subject to such rules the public have a right to inspect the records of subordinate courts and the only valid reason for refusing inspection would be that the inspection of the particular record was against public interest [*Ladli v R* 53 All 724; AIR 1931 All 364]. Subject to rules that may be made by the High Court, a judge or a magistrate has a discretion to allow inspection of record, but the discretion is to be exercised judicially. The right to a certified copy presupposes a right of inspection. It is altogether unreasonable to insist that a party must take certified copies of all documents on the record in order to determine df which documents he really requires

> copies. Therefore prima facie, under s 548 [now s 363(5)] Indian Criminal Procedure Code a party would have an implied right to ask the court to allow inspection of the record [*Parasuram v Coke*]. A

Thus what is relied upon here is the common law right as a person having an interest in the record. Such a right was recognized in *Anthony Gomez v Ketua Polis Daerah Kuantan* [1977] 2 MLJ 24 FC, in respect of the right of inspection of a first information report. It was held also since it is admissible under s 77 of the Evidence Act, a copy is to be supplied. It is to be noted that what is ordered to be supplied is a certified copy. B

Thirdly, he tenders the legal fees therefor. *Sarkar*, continuing from the paragraph above at p 1076 has this to say: C

> Section 76 [Indian Evidence Act 1872] gives the right to obtain a certified copy of a public document which any person has a right to inspect on payment of legal fees. The right to obtain a certified copy therefore presupposes the right to inspect. But a right of inspection does not necessarily carry with it a right to take copies. It was held that statute which gives a person a right of inspection gives him no right to take copies himself, because the statute gives him a right to have copies on payment, and there was no ground for implying any other right [*Re Balaghat G M Co* [1901] 2 KB 657; *Ormerod Grierson & Co v St George's IW Ltd* [1905] 1 Ch 506 at p 512]. Following these cases it has been held that in the case of a statutory right of inspection, the court will not imply a right to take copies, unless the right would otherwise be of no avail or practically useless [*Rameswar v Calcutta W & S Assn* 42 CWN 161]. D E

There is no undertaking or offer to pay any fees in the letters to the Respondents. The orders applied for does not provide that the orders are subject to the payment of any relevant fees.

Conclusion F

The foregoing shows the document must be a document that is existing, being the act or the record of the acts of the public officer. Then only does s 76 provide for certified copies of that public document to be made. There is clearly no provision to require the public officer to prepare a 'jadual terperinci' as is prayed for in this application. The application in this case is not for any record that demonstrably exists. G

As to the other defects in the application referred to above, I have only this to say. There is no sign of the usual cure-all prayer 'And such other orders as the Court thinks fit'. That would have allowed the Court to consider other orders. Why this is not included is not for the Court to speculate. In the circumstances I am constrained to make this decision on the application as it stands. H

For the foregoing reasons, I would reject this application.

Application dismissed.

Reported by Andrew Christopher Simon I